SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 141

A. LESTER MARKS, ELIZABETH LOY MARKS AND HERBERT M. RICHARDS, TRUSTEES OF THE ESTATE OF L. L. MCCANDLESS, DECEASED,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioners pray that this Court grant rehearing of its order of October 8, 1951, denying the petition for writ of certiorari and that a writ issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above cause as prayed for in the petition filed June 23, 1951.

Reasons for Granting Rehearing and Issuing the Writ

(1) This case involves a determination by the court below of a large question involving the administration of the land laws of the Territory of Hawaii. The Attorney General of Hawaii who was not a party and has not been

heard in any court should be given the opportunity to demonstrate to this Court that the construction placed on the Hawaiian Organic Act by the court below is contrary to the settled interpretation of that act for the past fifty years and casts a cloud on thousands of transactions and titles to public lands in Hawaii which judgment if uncorrected will result in great mischief in the administration of our public lands.

(2) The Attorney General of Hawaii did not appear in the court below but filed a brief after the opinion in support of our petition for rehearing. When petitioners filed their petition for writ of certiorari in this Court the Attorney General of Hawaii filed a brief in support of it which was dated, Honolulu, September 20, 1951. Counsel for petitioners does not know whether the brief of the Attorney General of Hawaii was distributed in time for consideration by this Court.

(3) This is a case where the usual criterion of a conflict among circuits cannot possibly arise since any question involving titles clouded as a result of the judgment below could of necessity only reach the Court of Appeals for the Ninth Circuit and no other Court of Appeals, *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 305 U. S. 47, 50 (1938).

(4) Although this suit is brought under a private act it involves an issue of great public importance to the people of the Territory of Hawaii. The fact that the Hawaiian Organic Act is applicable only in a limited geographical area and that the interest in real estate created thereunder can only be tested in the Court of Appeals for the Ninth Circuit should not deprive petitioners of a hearing on this critical issue.

Conclusion

For the reasons set forth above and in the writ of certiorari, it is respectfully urged that a rehearing be granted

and that upon such rehearing a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

Dated: Honolulu, Hawaii, October 20, 1951.

Respectfully submitted,

J. GARNER ANTHONY,
Counsel for A. Lester Marks,
Elizabeth Loy Marks and Herbert M. Richards,
Trustees of the Estate of L. L. McCandless,
Deceased, Petitioners.

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the Rules of this Court.

J. GARNER ANTHONY,
Counsel for Petitioners.

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In the Supreme Court
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OCTOBER TERM, 1951

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UNITED STATES OF AMERICA,
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BRIEF OF THE TERRITORY OF HAWAII AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

WALTER D. ACKERMAN, JR.
Attorney General of the Territory of Hawaii

RHODA V. LEWIS
Deputy Attorney General of the Territory of Hawaii
On Behalf of the Territory of Hawaii as Amicus Curiae

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BRIEF OF THE TERRITORY OF HAWAII AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

OPINION BELOW

The opinion of the Court of Appeals (R. 404-420) is reported at 187 F. 2d 724. The findings of fact and conclusions of law of the District Court (R. 14-18) are unreported.

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered March 5, 1951 (R. 420-421). A petition for rehearing was denied on May 15, 1951 (R. 421). The petition for a writ of certiorari was filed on June 23, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254 (1).

INTEREST OF THE AMICUS CURIAE IN THIS CASE

The Territory is interested only in the first of the four errors urged by the petition (Pet. 5), namely:

> "The Court of Appeals erred:
> (1) In holding that Sec. 91 of the Hawaiian Organic Act permitted the United States to take petitioners' leaseholds of public lands without compensation;".

The interest of the amicus lies in the fact that Congress, in the exercise of its power over the lands ceded to the United States by the Republic of Hawaii and in conformity with the terms of the cession, has enacted laws vesting in officers of the Territory of Hawaii wide powers of management of the public lands of Hawaii, including power to make leases for a maximum number of years specified by such laws, as well as the power of sale for certain purposes. These laws are special laws governing the public lands of Hawaii in lieu of the land laws of the United States, and under them the management of the public lands of Hawaii is centered in the territorial land office in lieu of the Bureau of Land Management of the United States. The opinion below holds that by reason of section 91 of the Hawaiian Organic Act, which provides that the Territory's powers of management may be ter-

minated and the land taken for military or other federal use, the rights of the Territory's lessees are vitiated whenever such use is decided upon. This is contrary to the principle well established in this Court, that contract rights, acquired in the public domain under the laws of the United States, are good against a subsequent order withdrawing the land from availability under said laws.

This well established principle does not mean that ceded lands under lease cannot be taken for military or other federal use pursuant to section 91 of the Hawaiian Organic Act. It does mean that unless authority to cancel the lease can be found within the four corners of the contract itself, the land so taken is subject to an encumbrance which is property within the meaning of the Fifth Amendment.

The Territory of course does not contest the applicability of the withdrawal clause contained in the leases here involved, relied upon by the territorial land office as its authority for the cancellation of these leases. But the granting or denial of certiorari should not turn upon the question whether the petitioners will be successful in contesting the applicability of that clause, because the court below has decided in a way in conflict with the applicable decisions of this Court a question of fundamental importance in the administration of the public land system of Hawaii.

QUESTION PRESENTED

When Congress (A) has authorized the Commissioner of Public Lands of the Territory of Hawaii to manage the public lands, including the specific power of leasing the same for a term of twenty-one years, and (B) has authorized the Governor of Hawaii or the President to terminate such management and take land for military or other federal

use, does the exercise of authority under "(B)" vitiate a leasehold already created under the authority of "(A)"?

STATUTES INVOLVED

The pertinent statutory provisions are printed in the appendix or footnotes.

STATEMENT

The case is stated in the petition (Pet. 3-5) and brief in opposition (Br. Opp. 4-8). One further matter is important, that is, that the opinion below in effect attributes to the Governor of Hawaii an act which he did not do and would not have done, namely to take without compensation leaseholds made by the Commissioner of Public Lands of the Territory. All that the Governor did was to take the lands from the land office's management for the use of the United States after the leases were cancelled by the land office, which relied for its authority on the provisions of the leases themselves. (R. 34-37, 411-412.) Had the leases not been so cancelled the Governor would have noted them in the executive order setting the land aside for the use of the United States.[1]

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[1] This was done in at least two instances:

(1) In Executive Order 1038, issued on November 18, 1943, which was for the land involved in *United States v. Chun Chin,* 150 F. 2d 1016, the executive order recited that the United States, on September 5, 1940 in Civil No. 430, had filed a Judgment on Declaration of Taking, and that at the date of said filing "the status of said land was • • • that the Territory of Hawaii had executed • • • General Lease No. 2515 to Chun Chin."

(2) In Executive Order No. 1284, issued on November 26, 1948 after correspondence between the Territory and the Department of the Navy and Department of Justice as to the form of this order, land was set aside for the use of the United States:

> "Subject to such rights, if any, as may be enjoyed under General Leases 2306 and 2516 issued by the Commissioner of Public Lands."

ARGUMENT

1. As a preliminary to the argument it must be noted that the authority of the Commissioner of Public Lands of the Territory of Hawaii to lease these lands for a term of twenty-one years, is unquestioned. (Br. Opp. 11.) Such authority was conferred by Congress by this chain of events:

(a) By the terms of the cession of such land to the United States by the Republic of Hawaii it was provided that:

> "The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition."[2]

(b) By the Hawaiian Organic Act, as enacted by the Act of April 30, 1900[3] Congress enacted "special laws" for the ceded public lands by continuing in force the "laws of Hawaii",[4] defined as meaning the laws of the Republic of Hawaii.[5] Congress likewise continued the appropriate territorial officers in the exercise of the powers conferred by the laws so continued in effect.[6]

(c) Among the laws of the Republic of Hawaii so continued in force was a section providing for general leases to be made at public auction for a term not to exceed twenty-one years.[7]

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[2] Resolution of the Senate of the Republic of Hawaii ratifying the Treaty of Annexation of 1897; Newlands Resolution, 30 Stat. 750, App. pp. 1-2.

[3] 31 Stat. 141, c. 339. Relevant portions of the Organic Act as enacted in 1900 appear in the appendix, pp. 2-4. These same provisions as they read today appear in the appendix, pp. 4-8.

[4] Sec. 73, App. pp. 3, 4.

[5] Sec. 1, App. p. 2.

[6] Sec. 73, App. pp. 3, 5.

[7] Section 203 of the Civil Laws of 1897, now section 4544 of the Revised Laws of Hawaii 1945, App. p. 10.

2. Congress having authorized a lease for a term of years, the leasehold made under that authority was a contract right entitled to the protection of the Fifth Amendment.[8] When the Solicitor General says: "But the fact that the leases were lawfully made does not show that they were unlawfully terminated," and then refers to the "power to withdraw reserved by section 91" (Br. Opp. 11), he assumes that in section 91 Congress provided for the withdrawal of the land from the lease, which is the point in issue. The assumption is unjustified. Section 91 simply reserves to the Governor of Hawaii and the President the power to take the land from the management of the territorial land office for the use of the United States.[9] A similar power of the President to take land from the Bureau of Land Management is contained in the laws of the United States governing the public domain on the mainland of the United States in the Act of June 25, 1910.[10] Under ordinary prin-

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[8] *Lynch v. United States,* 292 U.S. 571.

[9] Section 91 provides:

"• • • the public property ceded and transferred to the United States by the Republic of Hawaii • • • shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until • • • taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii • • •."

(32 Stat. 141, c. 339, Sec. 91.)

The full section 91 appears in the appendix at p. 4 as originally enacted, and at pp. 7-8 as the section reads today.

[10] 36 Stat. 847, section 1; 43 U.S.C. 141, as follows:

"Section 141. Withdrawal and reservation of lands for water-power sites or other purposes. The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classificaiton of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress."

ciples of agency such power of one officer to take land from the management of another officer does not contemplate the cancellation of contract rights conferred by the former in the execution of his authority before the land was withdrawn from his management.

In the decisions of this Court it is well established that when, under the laws of the United States, a right is acquired in public land before the President withdraws such land from aavilability under said laws, the right is good against the subsequent withdrawal of the land; the statutory authority for such withdrawal is not read into the law authorizing the right as a limitation upon the acquisition of the right. Whether the events preceding the actual withdrawal of the land reached fruition in a contract right has been this Court's only concern in such cases.[11] In some instances the executive order making the withdrawal from the public domain has contained specific exceptions to preserve uncompleted entries that were only inchoate rights, and in reaching the holding that inchoate rights were intended to be preserved this Court has pointed out that a vested right "obviously" needs no exception to preserve it.[12]

The War Department, as well as the Territory, has construed territorial leases as good against subsequent with-

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[11] *Payne v. Central Pacific Ry. Co.*, 255 U.S. 228 (1921), and *Wyoming v. United States*, 255 U.S. 228 (1921), involving withdrawals from the public domain made by the President under the Act of June 25, 1910, quoted in note 10 supra. See also *United States v. Fitzgerald*, 15 Pet. 407 (1841); *Payne v. New Mexico*, 255 U.S. 267 (1921), and *United States v. Midwest Oil Co.*, 236 U.S. 459, 477.

[12] *Stockley v. United States*, 260 U.S. 532, 544 (1923). Section 2 of the Act of June 25, 1910, cited in note 10, preserves uncompleted entries and other inchoate rights when land is withdrawn from settlement.

drawals for military purposes[13] and the Solicitor General (Br. Opp. 14) errs in asserting that section 91 has never been interpreted as petitioners contend. The opinion below, for the first time,[14] holds that a withdrawal from the public domain for federal use in itself divests existing contract rights. The court should have held that the power of termination must be found within the four corners of the contract.

3. When the contract is to contain a provision for the foreshortening of the lease for public purposes, the land laws of Hawaii so state. There are two such provisions, both of them specific and of restricted application,[15] from which

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[13] In reporting on the bill that became the Act of June 19, 1930 (46 Stat. 789, c. 546) the War Department, in support of its retention of Hawaiian ceded lands set aside for its use but subsequently rented by it to private persons, took the position that if the lands were returned to the Territory it would not be assured of having them when it needed them, *because the land would be placed under a lease by the Territory and could not be withdrawn therefrom.* The solution worked out by the bill was to cover into the Treasury of the Territory the rentals received by federal departments.

The War Department's report is printed at p. 38 of the appendix to the amicus brief in support of the petition for rehearing in the court below, which was transmitted to this Court with the record. The committee report on the bill appears at pp. 35-39 of the appendix to that brief.

[14] *United States v. Chun Chin,* 150 F. 2d 1016, C.A. 9th 1945, (Br. Opp. 11, 14) did not pass on this point. Indeed, the court below said that the *Chun Chin* case did not involve the question of the lessee's right to compensation (R. 417). That case held that the United States could not condemn public land that had been ceded to it by the Republic of Hawaii, that the government erred in filing a declaration of taking for such land instead of seeking an executive order, that the government should have been allowed to rectify this error by vacating the judgment on the declaration of taking as it sought to do, and that since according to the record the lessee's possession had not been disturbed, the motion to vacate the judgment on the declaration of taking was timely.

[15] (1) Section 73 (d) of the Organic Act relates to leases of agricultural lands. It was added in 1908 (Act of April 2, 1908, 35 Stat. 56, c. 124) to take care of a matter held in abeyance in the original act when Congress cut the term of agricultural leases to five years

it again appears that section 91's general provisions are not intended to cover this subject matter, that on the contrary section 91 is a mere provision for termination of the land office's management.

"until Congress shall otherwise direct." (Act of April 30, 1900, 31 Stat. 141, c. 339, s. 73.) In 1908 Congress permitted fifteen year terms, subject to the requirement that the lease provide:

> "The land, or any part thereof so leased, may at any time during the term of the lease be withdrawn from the operation thereof for homestead or public purposes, in which case the rent reserved shall be reduced * * *."

By the Act of July 9, 1921, 42 Stat. 116, c. 42, Congress permitted the omission of this withdrawal provision from leases of sugar cane lands; there was added a proviso that the land commissioner, with the approval of the governor and board of public lands:

> "may * * * omit such withdrawal provision from the lease of any lands suitable for the cultivation of sugar cane whenever he deems it advantageous to the Territory of Hawaii. Land so leased shall not be subject to such right of withdrawal."

The full section 73 (d) is printed in the appendix, pp. 5-6.

(2) Section 188 of the Civil Laws of 1897, continued in effect by Congress and now part of section 4543, Revised Laws of Hawaii 1945, provides:

> "* * * leases of public lands * * * may contain a proviso that the Government may at any time with reasonable notice and without compensation, except for improvements taken, take possession of any part of the premises covered by such leases which may be required for laying out and constructing new roads or improving or changing the line or grade of old roads, * * *." (The full section is printed in the appendix, p. 9.)

This section is inexplicable under the theory of the court below that a provision for taking public land from land office management for public use in itself contemplates the foreshortening of leases. Withdrawal of land from land office management for roads and other territorial purposes elsewhere is provided for by a separate section which parallels section 91's provision for such withdrawals for federal purposes. Originally this was section 186 of the Civil Laws of 1897, which was continued in effect by Congress until it was superseded in 1910 (Act of May 27, 1910, 36 Stat. 444, c. 258) by an amendment of section 73 of the Organic Act inserting in that section a provision for orders setting aside land for public purposes, now subsection (q) of section 73. This legislative history is more fully reviewed at pp. 18-20 of the amicus brief filed in support of the petition for rehearing in the court below and transmitted to this Court with the record.

These two specific provisions for the foreshortening of leases are not the same sections that confer the power to lease. In contrasting the latter sections with section 91 (Br. Opp. 1), the Solicitor General does not reach the problem.

4. The ninth circuit's departure from established principle is not cured by the argument that only territorial leases are affected, and these usually contain clauses whereby power of termination of the leases for public use can be found within the four corners of the contracts (Br. Opp. 13-14).[16] By this argument the Solicitor General places outside the reach of section 91 the Territory's contracts of sale and contracts conferring options of purchase, to which the petition refers. (Pet. 7, note 3.)[17] These contain no express withdrawal clause and to the contrary often expressly require that improvements be made by those dealing with the Territory, in order to assure the carrying out of the policies of Congress in respect of the purposes for which public lands may be privately acquired. Use of the decision below to effect forfeitures of such contracts would impose extreme hardship. Moreover, in 1946 (Act of August 7, 1946, 60 Stat. 871, c. 771) Congress made an amendment of section 73 of the Organic Act which assumes and thereby recognizes that the Hawaiian agreements of sale create vested rights good against later military needs.[18]

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[16] However, there are outstanding about forty-five easements for twenty-one year terms without withdrawal clauses.

[17] The types of contracts and statutory authority therefor are reviewed in the petition and at pp. 3-7, 23 (note 31), and 25-26 of the amicus brief filed in the court below in support of the petition for rehearing and transmitted to this Court with the record.

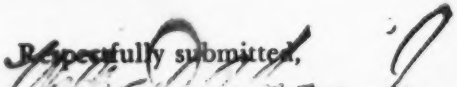
[18] This is explained at pp. 23-24 of the amicus brief filed in support of the petition for rehearing in the court below and transmitted to this Court with the record. The cited 1946 act and Committee Report thereon are printed at pp. 42-46 of the appendix to that brief.

Such circumstances should be considered by this Court. They emphatically show that contract rights are outside the reach of section 91. In asking this Court to proceed on the basis of a differentiation that assumes inapplicability to contracts other than leases of the Court's statement "the provisions of section 91 must in any event be read into the contracts" (R. 417) the Solicitor General does not explain why it is wrong to say this of contracts other than leases and at the same time right to say it of leases. The opinion is a cloud upon public land transactions in Hawaii and should not be left in effect.

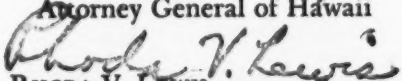
CONCLUSION

Certiorari should be granted for the review of that portion of the judgment denying compensation for the cancellation of the territorial leases.

Respectfully submitted,



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Attorney General of Hawaii



RHODA V. LEWIS
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Counsel for the Territory of Hawaii, Amicus Curiae

September 20, 1951